SYSMEX (MALAYSIA) SDN BHD A

v.

SIA KEE CHOW & ORS

HIGH COURT MALAYA, SHAH ALAM B
SURAYA OTHMAN J
[CIVIL SUIT NO: MT4-22-366-2006]
14 MARCH 2013

COMPANY LAW: *Directors - Fiduciary duties - Breach of duties - Whether directors breached fiduciary and statutory duties by setting up companies in secret - Whether directors guilty of diverting funds for personal gain - Whether directors failed to act in good faith in best interest of company - Companies Act 1965, ss. 131 & 132* C

The plaintiff's suit against the first and second defendants was for breach of fiduciary and statutory duties which they owed the plaintiff when they were, respectively, the managing director and director of the plaintiff. The two defendants had, without the plaintiff's knowledge and consent, set up and beneficially owned two companies, namely, the third defendant 'MMSB', and another company called Mega Tech, the latter of which competed with the plaintiff's business. MMSB, against which the instant suit was withdrawn following its winding-up, was appointed by the first defendant to be the tendering agent for the plaintiff's products in return for a fixed commission on sales. The plaintiff alleged, however, that funds received by MMSB from sales of the plaintiff's products were used by the first and second defendants for their own benefits. The plaintiff, *inter alia*, claimed against the first and second defendants, as constructive trustees for the plaintiff, for the return of all monies received, benefits obtained and assets and properties acquired by them arising from the breach of their fiduciary and statutory duties. D E F G

Held (allowing plaintiff's claim with costs): H

(1) The plaintiff had proven its case on the balance of probabilities. Not only did the first and second defendants breach their fiduciary duties to the plaintiff but they had also breached ss. 131 and 132 of the Companies Act 1965. The defendants failed to disclose their interest in MMSB and Mega I

Tech to the plaintiff, deliberately caused MMSB to be indebted to the plaintiff, diverted MMSB's funds from sales of the plaintiff's products for their personal benefit, obtained payments and secret profits from MMSB and failed to act in good faith in the best interest of the plaintiff. (paras 23, 31, 40 & 50)

(2) As a managing director, the first defendant owed a duty of fidelity to the plaintiff. It was an express term in his letter of appointment that he was not to become a director or employee of any other company or organisation. (para 32)

(3) Adverse inference was invoked against the second defendant on her failure to testify without offering any explanation on why she did so. The plaintiff's evidence against her ought to be accepted as the truth since the same was unrebutted by the second defendant. (paras 26 & 30)

Case(s) referred to:

Araman Jaya Sdn Bhd v. Kumpulan A Besik Sdn Bhd [2011] 8 CLJ 557 HC ***(refd)***

Attorney General v. Blake [1998] 1 All ER 833 ***(refd)***

Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd [1991] 1 CLJ 9; [1991] 1 CLJ (Rep) 155 SC ***(refd)***

Intraco Ltd v. Multi-Pak Singapore Pte Ltd [1995] 1 SLR 313 ***(refd)***

Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***

Janagi v. Ong Boon Kiat [1971] 1 LNS 42 HC ***(refd)***

KFH Ijarah House (M) Sdn Bhd v. Aamir Nordin Ariffin [2010] 1 LNS 394 HC ***(refd)***

Nanyang Development (1966) Sdn Bhd v. How Swee Poh [1969] 1 LNS 116 FC ***(refd)***

Neptune (Vehicle Washing Equipment) Ltd v. Fitzgerald [1995] 3 All ER 811 ***(refd)***

Sundram Ramasamy v. Arujunan Arumugam & Anor [1994] 4 CLJ 300 SC ***(refd)***

Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***

Tenaga National Berhad (Formely Lembaga Letrik Negara Tanah Melayu) v. Perwaja Steel Sdn Bhd (Formely Perwaja Terengganu Sdn Bhd) [1995] 4 CLJ 670 HC ***(refd)***

Wisma Punca Emas Sdn Bhd v. Dr Donal R O'Holohan [1986] 1 LNS 46 SC ***(refd)***

Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 131(1), (5), (6), (7), (8), 132(1)
Evidence Act 1950, ss. 101(1), (2), 114(g)

For the plaintiff - Tan Yee Boon (Emelyn Alexander with him); M/s Khaw & Partners
For the defendants - R Thayalan; M/s R Thayalan

Reported by Ashok Kumar

JUDGMENT

Suraya Othman J:

Introduction

[1] The plaintiff's claim against the first and second defendants are for breaches of their fiduciary duties owed by them to the plaintiff as managing director ("MD") and director respectively of the plaintiff's company. The plaintiff claimed that the first and second defendants during their employment in the plaintiff's company had without its consent and knowledge set up two companies, Megah Mahsuri Sdn Bhd ("MMSB") and Mega Tech Sdn Bhd ("Mega Tech") which were beneficially owned by the first and second defendants. The first defendant then as plaintiff's MD appointed MMSB as a tendering agent for the plaintiff's product ("Sysmex products") to be sold to government hospitals and health clinics. The plaintiff claimed that MMSB had at all material times agreed that all payments received by MMSB from the various government hospitals and health clinics for the Sysmex products supplied by the plaintiff to MMSB were to be received by MMSB solely and exclusive for the plaintiff's benefit. In return MMSB was to receive a fixed sales commission. Instead, the plaintiff alleged that the first and second defendants deliberately diverted MMSB's funds, meant for payments of the Sysmex products supplied by the plaintiff for the first and second defendant' own personal benefits. The plaintiff also claimed that Mega Tech was set up by the first defendant to sell products which compete with the plaintiff's Sysmex product. Thus the plaintiff claimed for the return of all the money received, benefits obtained, assets and properties acquired by the first and second defendants relating to, connected with or arising from the breaches of fiduciary duties by them which benefits were meant for the plaintiff as payment for its Sysmex products.

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Facts Of The Case

[2] The plaintiff is a wholly owned subsidiary of Sysmex Singapore Pte Ltd, now known as Sysmex Asia Pacific Pte Ltd ("Sysmex Singapore") which in turn is a wholly owned subsidiary
B of Sysmex Corporation of Japan ("Sysmex Japan"). Sysmex Japan is engaged in the development, production and sale in diagnostic testing equipment and reagents, particle analyses and related software ("Sysmex products").

C **[3]** The plaintiff has been carrying on the business of distributing Sysmex products in Malaysia ("the plaintiff's business") since 1998.

[4] The first defendant was the former managing director ("MD") of the plaintiff's company from 9 June 1998 until
D 26 September 2005 when he resigned from the plaintiff's company.

[5] The second defendant who was the wife of the first defendant was a director of the plaintiff's company from 9 June
E 1998 until 26 September 2005 and also a director of the third defendant from 15 April 2005 to 29 June 2005.

[6] The first defendant's term of employment as the plaintiff's MD are set out in the letter dated 2 February 1998 ("letter of
F employment"), P1 from Sysmex Singapore to the first defendant.

[7] The plaintiff alleged that the first and second defendants breached their fiduciary duties to the plaintiff when the first and second defendants whilst being the managing director and director of the plaintiff's company had set up the third defendant
G ("MMSB") without the plaintiff's knowledge and consent. The first defendant had also set up another company, without the knowledge of the plaintiff, known as Mega Tech Sdn Bhd ("Mega Tech") whilst still in the plaintiff's employment to compete with the Sysmex products supplied by the plaintiff.

H

[8] The first defendant had set up MMSB using two Bumiputera nominees, Mr Ismail bin Mohd Othman, PW2 and Mr Sazali bin Shamsuddin who held shares for and took full instructions from the first defendant without the plaintiff's
I knowledge and consent.

[9] Upon the setting up of MMSB, the first defendant acting as the plaintiff's managing director then had caused the plaintiff to appoint MMSB as the plaintiff's tendering agent for Sysmex products to be sold to government hospitals and health clinics whereby MMSB was to receive a fixed sales commission.

[10] After the resignation of the first and second defendants' from Sysmex Malaysia, the plaintiff discovered that:

(i) the first defendant had beneficially owned all the shares in MMSB;

(ii) the first and second defendants had received various benefits from MMSB in an aggregate amount in excess of RM1,000,000; and

(iii) the first defendant deliberately caused the dissipation of MMSB's assets, of which includes money held on trust for the plaintiff's benefit.

[11] It is the plaintiff's contention that the first and second defendants had breached their fiduciary duty when they had deliberately.

(i) placed themselves in a position of conflict of interest by failing to disclose their respective interest in MMSB and Mega Tech to the plaintiff;

(ii) the first defendant as the plaintiff's managing director had breached his obligations as an employee by failing to disclose his acquired interest in MMSB and Mega Tech, in contravention to the terms of his letter of appointment, P1;

(iii) the first defendant failed to act in the plaintiff's best interest by causing MMSB to be indebted to the plaintiff;

(iv) the first and second defendants enriched themselves by receiving benefits (ie, secret profits) from MMSB; and

(v) the first defendant diverted MMSB's funds meant for payment of the Sysmex products supplied by the plaintiff including sums held on trust for the plaintiff's benefit.

[12] The plaintiff contended that as directors of the plaintiff's company the first and second defendants had breached their statutory duties as provided under ss. 131 and 132 of the Companies Act 1965. The plaintiff further contended that the first and second defendants became constructive trustees for the plaintiff of all money received, benefits obtained, assets and properties acquired by them relating to, connected with/or arising from the aforesaid breaches of their fiduciary duties.

[13] The first and second defendants on the other hand contended that the first defendant had informed of his involvement in MMSB and Mega Tech to Mr Kenji Tachibana, the MD of Sysmex Singapore and the same was duly consented by Sysmex Singapore.

[14] That since the plaintiff, specifically Mr Kenji Tachibana purportedly had the knowledge that the first defendant is the beneficial owner of MMSB, the first defendant therefore is entitled to all profits arising from MMSB's business dealings.

[15] The first and second defendants claimed that MMSB does not owe the plaintiff any sums of money whatsoever and instead there is an overpayment of RM401,719.23 to the plaintiff.

[16] The first and second defendants alleged that Mr Tan Eng Keong, PW1, who is the present MD for the plaintiff since 17 October 2005 and Mr Ismail bin Mohd Othman, PW2, who was the former director and MD of MMSB have conspired to commit fraud against MMSB as the sums owed by MMSB to the plaintiff had been purportedly paid off.

[17] The first and second defendants alleged that the first and second defendants involvement in MMSB had purportedly benefited the plaintiff.

[18] The first and second defendants contended that ss. 131 and 132 of the Companies Act 1965 are not applicable in this case since their involvement in MMSB are known to Mr Kenji Tachibana of Sysmex Singapore.

Issues To Be Tried

[19] The parties agreed that the issues to be tried are set out as below.

(a) Whether the first defendant had breached the terms of employment as an MD of the plaintiff as set out in a letter dated 2 February 1998 ("letter of employment"), P1 issued by Sysmex Singapore Pte Ltd ("Sysmex Singapore") to the first defendant.

(b) Whether the first defendant and second defendant had breached their fiduciary duty of good faith and fidelity to the plaintiff.

(c) Whether the first and second defendants owed to the plaintiff the following fiduciary duties, *inter alia*:

(i) a duty at all times to act honestly or *bona fide* in the interest of the plaintiff in the discharge of their duties as directors;

(ii) a duty not to place themselves in a position where their duties as directors and personal interest conflict;

(iii) a duty to disclose their interest, direct or indirect, in any company or corporation or transaction which might give rise to a conflict of their personal interest with that of the plaintiff; and

(iv) a duty not to make use of their positions as directors to obtain profit for themselves.

(d) Whether the first and second defendants had breached their fiduciary duties owed to the plaintiff when they used Mega Tech Sdn Bhd ("Mega Tech") to sell products which compete with Sysmex products supplied by the plaintiff when they were the directors of the plaintiff.

(e) Whether the plaintiff and MMSB had at all material times agreed that all payments received by MMSB from the various government hospitals and health clinics for Sysmex products supplied by the plaintiff were to be received by MMSB solely and exclusive for the plaintiff's benefit.

(f) Whether the first defendant had breached his fiduciary duties to the plaintiff when he:

(i) at all material times, failed to disclosed to the plaintiff, his interest in the MMSB and Mega Tech;

(ii) participated in MMSB's business without the plaintiff's knowledge and failed to devote his full time to his employer, the plaintiff;

(iii) participated in Mega Tech's business which sells products that are in competition with Sysmex products;

(iv) failed to exercise due diligence to ensure that MMSB made payments for products supplied by the plaintiff in the manner agreed; and

(v) deliberately diverted MMSB's funds, meant for payments of the Sysmex products supplied by the plaintiff, for his and the second defendant's own personal benefits.

(g) Whether the second defendant had breached her fiduciary duties to the plaintiff when she:

(i) failed to disclose to the plaintiff, her interest in both MMSB and Mega Tech; and

(ii) participated in the diversion of MMSB's funds meant for payments for the Sysmex products supplied by the plaintiff for her own personal benefits.

(h) Whether the first and second defendants became constructive trustees for the plaintiff of all money received, benefits obtained, assets and properties acquired by them relating to, connected with and arising from the aforesaid breaches of their fiduciary duties. If the answer is in the positive, then:

(i) The first and second defendants are liable to account to the plaintiff for all such money, benefits, assets and properties; and

(ii) The plaintiff is entitled to trace all such money, benefits, assets and properties in the hands of the first and second defendants or elsewhere.

(i) Whether the first and second defendants had also breached the statutory duties as provided in the Companies Act 1965 ("Companies Act"), namely:

(i) section 131 of the Companies Act 1965, when they failed to:

- disclose their interests and participations in MMSB and Mega Tech; and

- declare to the plaintiff the nature, character and extent of their interests and participations in MMSB and Mega Tech; and

(ii) section 132 of the Companies Act 1965, when they failed to at all times act honestly and use reasonable diligence in the discharge of their duties as directors.

(j) Whether the plaintiff is entitled to the reliefs sought in the statement of claim.

Decision Of The Court

[20] The plaintiff was represented by Mr Tan Yee Boon and Miss Emelyn Alexander and the first and second defendants were represented by Mr R Thayalan.

[21] The claim today only pertains to the first and second defendants since the plaintiff has withdrawn its claim against the third defendant on 17 January 2012 as the third defendant has been wound up. As such the general and specific prayers sought against the third defendant, Megah Mahsuri Sdn Bhd ("MMSB") are not relevant and this court does not have to decide on it since MMSB has been struck off from the suit. The counter-claim by the defendants has also been struck off. Thus this court has only to decide on the plaintiff's claim on prayers (7), (9), (10), (11) and (12) which pertains to the first and second defendants.

Issues To Be Tried

[22] In gist the issues to be tried by me centres on whether the first and second defendants breached their fiduciary duties when they, while being the MD and director respectively of the plaintiff's company then, participated and diverted the profits made by MMSB meant as payments for the supply of plaintiff's products

A to MMSB without the knowledge and consent of the plaintiff. In setting up Mega Tech to sell products which competed with the plaintiff's product, whether both the defendants had committed a breach of their fiduciary duty. To answer this, the questions that need to be asked are:

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(1) Whether the first defendant had breached the terms of employment as set out in the letter dated 2 February 1998, P1, issued by Mr Kenji Tachibana, the MD of Sysmex Singapore to the first defendant.

C

(2) Whether the first and second defendants had breached their fiduciary duty of good faith and fidelity to the plaintiff.

(a) whether the plaintiff and MMSB had agreed that all payments received by MMSB from the various government

D hospitals and health clinics for the Sysmex products supplied by the plaintiff were to be received by MMSB solely and exclusively for the plaintiff's benefit;

(b) whether the first and second defendants had become

E constructive trustees for the plaintiff in relation to the secret profits acquired by them arising from the aforesaid breaches of fiduciary duties. If the answer is in the positive then:

F

(i) the defendants are liable to account to the plaintiff for all such money, benefits, assets and properties; and

(ii) the plaintiff is entitled to trace all such money, benefits, assets and properties in the hands of the first and second defendants; and

G

(c) whether the first and second defendants had also breached the statutory duties as provided under the Companies Act 1965 (Act 125), namely, ss. 131 and 132.

H **[23]** I am of the opinion and in agreement with the submission made by the plaintiff's counsel, Mr Tan Yee Boon that the first and second defendants had breached their fiduciary duties to the plaintiff. I accepted the evidence of PW2, Mr Ismail bin Mohd Othman who was the former MD of MMSB and the evidence of

I PW1, Mr Tan Eng Keong who is the present MD of the plaintiff. I find both their testimonies to be consistent and truthful. PW2

testified that he and Mr Sazali bin Shamsuddin were nominees for the first defendant and he was instructed by the first defendant in the running of MMSB. From PW2's evidence and the evidence of the first defendant himself, I find that the first and second defendants had breached their fiduciary duties based on the following grounds:

(i) The first and second defendants had placed themselves in a position of conflict of interest when they failed to disclose their interest in the MMSB and Mega Tech to the plaintiff.

(ii) The first and second defendants had failed to act in the plaintiff's best interest as they had deliberately caused MMSB to be indebted to the plaintiff.

(iii) The first defendant diverted MMSB's funds, meant for payments of the Sysmex products supplied by the plaintiff for the defendants' own personal benefit.

(iv) The first and second defendants had obtained payments and derived secret profit from MMSB.

[24] Thus the first defendant being the plaintiff's managing director had breached his obligations as an employee of the plaintiff. In the case of *Attorney General v. Blake* [1998] 1 All ER 833, the Court of Appeal held:

> ... There is more than one category of fiduciary relationship, and the different categories possess different characteristics and attract different kinds of fiduciary obligation. The most important of these is the relationship of trust and confidence, which arises whenever one party undertakes to act in the interests of another or places himself in a position where he is obliged to act in the interests of another. The relationship between employer and employee is of this character. The core obligation of a fiduciary of this kind is the obligation of loyalty. The employee must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third party without the informed consent of his employer ...

[25] This principle was applied by Balia Yusof Hj Wahi J, (as he then was) in *KFH ljarah House (M) Sdn Bhd v. Aamir Nordin Ariffin* [2010] 1 LNS 394; [2010] MLJU 450.

[26] Despite the allegations against the second defendant, she elected not to testify and be subjected to cross-examination. Counsel for the defendants, Mr R Thayalan offered no explanation as to why the second defendant was not called to testify in court and it was merely noted in the witness statement of the first defendant, DW1 ("WSDW1") that the first defendant was authorised to testify on behalf of the second defendant, his wife. Therefore the plaintiff's evidence against the second defendant ought to be accepted as the truth as the same is not rebutted by the second defendant's own evidence. Further the first defendant himself (in his attempts to extricate himself) had made further allegations against the second defendant of which there are no forthcoming explanations from the second defendant.

[27] It must be noted that the second defendant is the only person who can give evidence on whether she was the sole beneficial owner of MMSB and on the benefits received from MMSB. In *Sundram Ramasamy v. Arujunan Arumugam & Anor* [1994] 4 CLJ 300; [1994] 3 MLJ 361, the Supreme Court held at pp. 372 to 373 that a defendant who has the necessary knowledge to testify on a particular point and had studiously elected not to give evidence shall do so at his own peril.

[28] In the Federal Court's case of *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381, Gopal Sri Ram FCJ, noted at pp. 398 to 401 as follows:

> ... two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. In the first place, the evidence given by the appellant ought to have been presumed to be true ... it was the duty of the judge to have accepted her evidence (ie, the appellant's evidence) as true in the absence of any evidence from the first respondent going the other way ...
>
> The second consequence is that the court ought to have drawn an adverse inference against the first respondent ... Where, as here, the first respondent being a party to the action provides no reasons as to why she did not care to give evidence the court will normally draw an adverse inference.

[29] See *Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd* [1991] 1 CLJ 9; [1991] 1 CLJ (Rep) 155, *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 where Peh Swee Chin FCJ, said:

> The respondents had chosen to close the case at the end of the appellants' case. Although they were entitled to do so, they would be in peril of not having the evidence of their most important witness and of having an adverse inference drawn against them for failing to call such evidence should the circumstances demand it.

[30] The second defendant has first-hand knowledge of the material facts relevant to the case however she failed to attend court to offer an explanation. Thus an adverse inference ought to be invoked against her.

[31] The first and second defendants are in breach of s. 131 of the Companies Act 1965 as they had failed to disclose their interest in MMSB and Mega Tech to the plaintiff and obtain the relevant consent. Section 131 of the Companies Act 1965 (Act 125) states:

> Disclosure of interests in contracts, property, offices, etc,
>
> 131. (1) Subject to this section every director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company shall, as soon as practicable after the relevant facts have come to his knowledge, declare the nature of his interest at a meeting of the directors of the company.
>
> (5) Every director of a company who holds any office or possesses any property whereby whether directly or indirectly duties or interests might be created in conflict with his duties or interests as director shall declare at a meeting of the directors of the company the fact and the nature, character and extent of the conflict.
>
> (6) The declaration shall be made at the first meeting of the directors held:
>
> (a) after he becomes a director; or
>
> (b) (if already a director) after he commenced to hold the office or to possess the property,
>
> as the case requires.

(7) The secretary of the company shall record every declaration under this section in the minutes of the meeting at which it was made.

(8) Except as provided in subsection (3) this section shall be in addition to and not in derogation of the operation of any rule of law or any provision in the articles restricting a director from having any interest in contracts with the company or from holding offices or possessing properties involving duties or interests in conflict with his duties or interests as a director.

Penalty: Imprisonment for seven years or one hundred and fifty thousand ringgit, or both.

[32] The first defendant being the managing director of the plaintiff owes a duty of fidelity to the plaintiff. It was an express term in the first defendant's letter of appointment dated 2 February 1998, P1, (under the heading other conditions) that the first defendant is "... not allowed to become a director or employee of any company or organisation". The said letter signed by Mr Kenji Tachibana, the MD of Sysmex Singapore Pte Ltd, P1, is set out below:

Sysmex SYSMEX SINGAPORE PTE LTD
10 Shenton Way, #15-01 MAS Building,
Singapore 079117
Tel: +65-221-3629 Fax: +65-221-3687
Email: sysmex@mbox5.singnet.com.sg

February 2, 1998

Mr. Frankie Sia Kee Chow

APPOINTMENT TO MANAGING DIRECTOR OF SYSMEX (MALAYSIA) SDN BHD

We have pleasure in appointing you to Managing Director of Sysmex (Malaysia) Sdn Bhd on the following terms and conditions.

1. Position	:	Managing Director
2. Date of commencement	:	April 1, 1999
3. Salary	:	MR18,000/month *This amount will be reviewed every calendar year.
4. Bonus	:	Bonusable.

5. Other Benefit

Company Car	:	Provided by company
Petrol for Company Car	:	Paid by company
P.A. Insurance for family	:	Paid by company
Home telephone bill	:	Paid by company
Handphone bill	:	Paid by company
Entertainment for business	:	Paid by company
Club membership subscription fees	:	Paid by company

6. Annual Leave : 21 days

7. Share and Dividend : You are allowed to have up to 30% share of Capital. The Capital is fixed to RM300,000.00

Dividend shall be paid based on performance of the company and approval of board meeting.

8. Other conditions : You are not allowed to become a director or employee of any other company or organization.

Yours faithfully

tt.

Kenji Tachibana
Managing Director

SYSMEX SINGAPORE PTE LTD

Accepted by:

tt.

...

Date:

[33] The first defendant had set up MMSB in the year 1999 by using two Bumiputera nominees, that is Mr Ismail bin Mohd Othman, (PW2) who is also the MD of MMSB, and Mr Sazali bin Shamsuddin, a director and shareholder of MMSB who held their shares for and take instructions from the first defendant. PW2 in his testimony confirmed this and the first defendant, DW1 did not challenge this fact. With regard to the evidence given by the first defendant, there were several discrepancies in the first defendant's oral evidence and as such should be rejected by this court.

[34] The first defendant had also set up Mega Tech which was formerly known as Mega E-Dotcom Sdn Bhd. The first defendant had admitted in his defence and during cross- examination that he beneficially owned Mega Tech and did eventually became a director of Mega Tech in the year 2002.

[35] Despite being aware of s. 131 of the Companies Act 1965 and the terms stipulated in the first defendant's letter of employment, P1, the first defendant did not inform the plaintiff or procure the plaintiff's express consent. The first defendant agreed during cross-examination that there are no documents evidencing the plaintiff's consent obtained by the first defendant.

[36] The first and second defendants had never informed the plaintiff of their interest in MMSB and Mega Tech. The first defendant argued that he had obtained the prior consent of the then MD of Sysmex Singapore Pte Ltd, Mr Kenji Tachibana. However, the same was not pleaded in the defendant' defence and Mr Kenji Tachibana was never called to substantiate this claim. It is trite law that parties must confine their case within the perimeters of their respective pleadings.

[37] In the case of *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330; [1990] 2 MLJ 152, the Supreme Court referred to and agreed with the observations made by Sharma J, (as he then was), in the case of *Janagi v. Ong Boon Kiat* [1971] 1 LNS 42; [1971] 2 MLJ 196 in which His Lordship elaborated on the function of pleadings and the duty of the courts to follow the rule of procedure and practice.

> The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact, it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.

[38] The principle in *Janagi* is also followed in the case of *Wisma Punca Emas Sdn Bhd v. Dr Donal R O'Holohan* [1986] 1 LNS 46; [1987] 1 MLJ 393 at p. 395 in which case this court had also referred to *Janagi v. Ong Boon Kiat* [1971] 1 LNS 42; [1971] 2 MLJ 196 and considered that Sharma J had rightly held that the trial of a suit should be confined to the pleas on which the parties are at variance.

[39] As the first defendant had admitted that he did not procure any written consent from the plaintiff in respect of his involvement with MMSB and Mega Tech and coupled with the fact that there are no corroborating evidence to prove the defendants assertions *vis-a-vis* the purported consent, it is clear that the plaintiff has, *prima facie*, proved that the defendants were in breach of the fiduciary duty.

[40] Apart from the duty to not place himself in a position of conflict of interest, a director owes a duty to act in good faith in the best interest of the company. This is provided for in s. 132(1) of the Companies Act 1965. The directors overriding motive must be to advance the company's interest. Section 132 states:

> As to the duty and liability of officers
>
> 132. (1) A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.

[41] The case of *Intraco Ltd v. Multi-Pak Singapore Pte Ltd* [1995] 1 SLR 313 suggest this rule is better stated as a duty to ensure that whatever transactions undertaken by the directors on behalf of the company, the same ought to be "commercially justifiable" on the company's point of view.

[42] The first defendant's contended that he has not breached his fiduciary duty to the plaintiff as he had disclosed his interest in MMSB and Mega Tech to Mr Kenji Tachibana. The purported disclosure of interest is within the first defendant's knowledge. Thus the burden of proving the same lies with the first defendant, as s. 101(1) and (2) of the Evidence Act 1950 (Act 56), states that whoever asserts a fact, must prove it. Section 101(1) and (2) are set out below:

> 101. Burden of proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[43] In the case of *Nanyang Development (1966) Sdn Bhd v. How Swee Poh* [1969] 1 LNS 116; [1970] 1 MLJ 145 the Federal Court held that:

> That rule means "the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it: for a negative is usually incapable of proof.

[44] In the case of *Tenaga National Berhad (Formely Lembaga Letrik Negara Tanah Melayu) v. Perwaja Steel Sdn Bhd (Formely Perwaja Terengganu Sdn Bhd)* [1995] 4 CLJ 670; [1995] 4 MLJ 673, the court held:

> Under s. 101(1) of the Evidence Act 1950, whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist. In other words, the plaintiff must prove such facts as the plaintiff desires the court to give judgment as to its right to claim against the defendant or the defendant's liability to pay the plaintiff. The burden of proof is on the plaintiff. Section 101(2). In order to succeed here the plaintiff must prove its claim affirmatively. Sila juga lihat kes *Nuri Asia Sdn Bhd v. Focis Corporation Sdn Bhd* [2006] CLJ 307).

[45] From the evidence adduced during cross-examination, the first defendant did not even consider locating or calling Mr Kenji Tachibana to support his assertion but merely attempted to prove the same by way of oral evidence. Thus the first defendant has failed to discharge his burden of proof. The first defendant did not call Mr Kenji Tachibana to testify on his behalf, thus s. 114(g) of the Evidence Act 1950 (Act 56) applies that if Mr Kenji Tachibana is called, his testimony would be unfavourable to the first defendant's case. Section 114(g) states:

> 114. Court may presume existence of certain fact.
>
> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> (g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it.

[46] In the case of *Araman Jaya Sdn Bhd v. Kumpulan A Besik Sdn Bhd* [2011] 8 CLJ 557, the court at p. 565 held as follows: A

> ... Section 114(g) of the Evidence Act 1950 only applies to material and important witnesses. The defendant's directors were clearly important witnesses for the defendant to disprove plaintiff's case and it is therefore, incumbent on the defendant to produce these witnesses to challenge and dispute plaintiff's testimony and not hope for the plaintiff to do so ... B
>
> The defendant's failure to dispute plaintiff's assertion during the cross examination of plaintiff's witnesses and defendant's failure to secure the attendance of their vital witnesses without reason and without any apparent effort, was found to be fatal to their case and for this reason, the adverse inference under s. 114(g) of the Evidence Act 1950 is invoked against the defendant ... C

[47] The defendants have not led any evidence to establish that the plaintiff has enjoyed any benefits by the setting up of MMSB and Mega Tech or that consent of the plaintiff was obtained in relation to the secret profits derived. D

[48] Thus I agree with the plaintiff's submission that the plaintiff in this case was blind-sided with the defendants' action in setting up MMSB and Mega Tech. The case of *Neptune (Vehicle Washing Equipment) Ltd v. Fitzgerald* [1995] 3 All ER 811 above illustrates that the defendants ought to have recorded the disclosure or declaration of their interest in the plaintiff's board of directors' minutes of meeting. This is notwithstanding the fact that they were the only two directors of the plaintiff's company. E F

> The sole director may hold a meeting attended by himself alone or he may hold a meeting attended by someone else, normally the company secretary. When holding the meeting on his own, he must still make the declaration to himself and have the statutory pause for thought, though it may be that the declaration does not have to be out loud, and he must record that he made the declaration in the minutes. The court may well find it difficult to accept that the declaration has been made if it is not so recorded. If the meeting is attended by anyone else, the declaration must be made out loud and in the hearing of those attending, and again should be recorded. In this case, if it is proved that the declaration was made, the fact that the minutes do not record the making of the declaration will not preclude proof of its making. In either situation the language of the section must be given full effect: there must be a declaration of the interest. G H I

[49] It must also be noted that s. 131(1) of the Companies Act 1965 also stipulated that the defendants shall declare the nature of their interest at a meeting of the directors of the company; s. 131(5) the nature, character and extent of the conflict of interest and s. 131(7) that the secretary of the company shall record the declaration in the minutes of the meeting. As the first and second defendants had not disclosed or made any such declarations of their interest nor did they record it in any minutes of meeting, *prima facie*, the defendants are in breach of their fiduciary duty.

Conclusion

[50] Therefore, on the balance of probabilities, I am satisfied that the plaintiff has proven its case. This court thus allowed the plaintiff's claim for prayers 7, 9, 10, 11 and 12 as stated below:

(a) Prayer 7: a declaration that the first and second defendants are jointly and severally liable to make good all sums received by MMSB from various government hospitals for products supplied by the plaintiff on orders procured by MMSB and not duly accounted for with interest thereon at the rate of 8% per annum from the respective dates when such payments become due to the plaintiff until the same shall be made good.

(b) Prayer 9: an account of all money paid to or for the benefit of the first or second defendants and each of them by MMSB and Mega Tech during the period when they were directors of the plaintiff (these pertains to the secret profits).

(c) Prayer 10: an order that each of the first and second defendant do pay the plaintiff such sum as may be found to have been paid to or for the benefit of each of them by MMSB and Mega Tech after the taking of the said account prayed in para. (9) together with interest.

(d) Prayer 11: costs.

(e) Prayer 12: under the heading further orders and reliefs this court may deem fit and proper, I ordered that the first and second defendants are liable to make good 96% only of the total amount in prayer 7 since the balance 4% are sums due to MMSB as commissions.

Costs

[51] Mr Tan Yee Boon prayed for costs of RM80,000 and Mr R Thayalan prayed for RM30,000, In the circumstances of the case, I feel the sum of RM50,000 is fair and adequate.

[52] Plaintiff's case allowed with RM50,000 as costs.